

REMARKS / DISCUSSION OF ISSUES

Claims 1-21 are pending in the application.

The Office action provisionally rejects claims 1-4, 6-7, and 9-12 on the grounds of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-5, 8-9, and 11-14 of copending U.S. patent application 10/529,353, hereinafter Rosner. The applicant respectfully traverses this rejection.

The criterion for an obviousness-type double patenting rejection is the same as an obviousness-type rejection under 35 U.S.C. 103(a), and MPEP 2142 clearly states:

"The key to supporting any rejection under 35 U.S.C. 103 is the clear articulation of the reason(s) why the claimed invention would have been obvious. The Supreme Court in *KSR International Co. v. Teleflex Inc.*, 550 U.S. ___, ___, 82 USPQ2d 1385, 1396 (2007) noted that the analysis supporting a rejection under 35 U.S.C. 103 should be made explicit. The Federal Circuit has stated that "rejections on obviousness cannot be sustained with mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006)."

The applicant's independent claims 1 and 9 include providing a measure of processing time in a response from a target node to a source node. Rosner does not teach or suggest including a processing time in a response, and Rosner's claims do not include this feature.

The Office action provides no basis to support this obviousness-type rejection other than to state that it would have been obvious that "the processing time and the query-response time is another way to express a communication time". Even assuming in argument that this statement is true, it does not address the inclusion of the processing time in a message from the target to the source.

Because Rosner's claims do not include at least the element of including a measure of processing time in a response from a target node to a source node, as specifically claimed in each of the applicant's independent claims, and because the Office action fails to provide a prima facie case of obviousness to support this provisional rejection, the applicant respectfully maintains that this provisional rejection is unwarranted and should be withdrawn.

The Office action rejects claims 1-21 under 35 U.S.C. 103(a) over Lundkvist (USPA 2003/0184431) in view of Fletcher et al. (USP 6,363,477, hereinafter Fletcher). The applicant respectfully traverses this rejection.

The combination of Lundkvist and Fletcher fails to disclose providing a measure of processing time in a response from a target node to a source node, as specifically claimed in each of the applicant's independent claims 1, 9, and 15.

The Office action acknowledges that Lundkvist fails to disclose providing a measure of processing time in a response from a target node to a source node, and relies on Fletcher for this teaching. The Office action asserts that Fletcher discloses this feature at column 18, lines 28-44. The applicant respectfully disagrees with this assertion. At the cited text, Fletcher states:

"With reference now to FIG. 11, and also to FIG. 3, an example illustrating the application of one embodiment of the present invention to request and response data packets is provided. With reference to step 1105, in this embodiment the network manager defines recognition characteristics 505 (FIG. 5) for client computer system 300 and for server computer system 350 as previously described. In steps 1110 and 1111, the recognition characteristics are applied to select data packets sent by one or the other of the computer systems. In steps 1115, 1116, 1117 and 1118, in this embodiment time-stamps T1, T2, T3 and T4 are applied to request and response data packets 390 and 395 at the end-node computer systems; that is, time-stamps T1 and T4 are applied at client computer system 300, and time-stamps T2 and T3 are applied at server computer system 395. Thus, in the present invention the time-stamps provide an accurate measure of when the data packets are transmitted and received by each of the computer systems in the computer network. Alternatively, in another embodiment time-stamps T1, T2, T3 and T4 are applied at the layered service provider to the socket calls corresponding to request and response data packets 390 and 395." (Fletcher, column 18, lines 28-44.)

As is clearly evident, the cited text does not reference a processing time, and does not reference including such a processing time within a response from a target node to a source node.

As the Office action notes, "Fletcher calculates this performance metric [query-response time] exactly to determine the proximity of one node to another" (Office action, page 5, lines 13-14). The applicant agrees with this statement, but specifically notes that Fletcher calculates this performance metric without including a measure of processing time in the response from the target node to the host node, as taught and claimed by the applicant. That is, Fletcher teaches an alternative scheme for calculating the query-response time that does not use a measure of processing time provided by the target node.

In *KSR Int'l. Co. v. Teleflex, Inc.*, the Supreme Court noted that the analysis supporting a rejection under 35 U.S.C. 103(a) should be made explicit, and that it is "important to identify a reason that would have prompted a person of ordinary skill in the relevant field to combine the [prior art] elements" in the manner claimed:

"Often, it will be necessary ... to look to interrelated teachings of multiple patents; the effects of demands known to the design community or present in the marketplace; and the background knowledge possessed by a person having ordinary skill in the art, all in order to determine whether there was an apparent reason to combine the known elements *in the fashion claimed* by the patent at issue. To facilitate review, this analysis should be made explicit." *KSR*, 82 USPQ2d 1385 at 1396 (emphasis added).

Even if one of skill in the art were to combine Lundkvist and Fletcher to improve the accuracy of Lundkvists' determination of the query-response time, the combination will not lead to a combination *in the fashion claimed* by the applicant. This combination does not teach or suggest including a measure of processing time in a response from the target node.

Fletcher discloses the use of four time stamps to accurately determine the query-response time. To arrive at the applicant's claimed invention from a combination of Lundkvist and Fletcher, one of skill in the art would have to disregard Fletcher's teachings and use the alternative technique that is taught solely by the applicant.

Given a combination of Lundkvist and Fletcher that provides an accurate determination of the query-response time, there is no apparent reason to search for an alternative means for determining this query-response time; and, specifically, absent the applicant's disclosure, there is no apparent reason to add a measure of the response time in the response from the target node, as taught and claimed by the applicant. Accordingly, the applicant respectfully maintains that the rejection of claims 1-21 under 35 U.S.C. 103(a) over Lundkvist in view of Fletcher is unwarranted, and should be withdrawn.

In view of the foregoing, the applicant respectfully requests that the Examiner withdraw the objection(s) and/or rejection(s) of record, allow all the pending claims, and find the application in condition for allowance. If any points remain in issue that may best be resolved through a personal or telephonic interview, the Examiner is respectfully requested to contact the undersigned at the telephone number listed below.

Respectfully submitted,

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